

NOV 17 2005

Woodburn v. Stewart
No. 04-16567

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RYMER, J., dissenting.

I would affirm, because the issue of equitable tolling on the ground of mental competency was never presented to the district court and is therefore waived. Responding to the state's position that AEDPA's one-year statute of limitations had run, Woodburn argued that he was entitled to the benefit of 28 U.S.C. § 2244(d)(1)(B), which delays commencement of the limitations period until a state-created impediment to filing is removed. Woodburn posited that denial of access to the courts is the state-created impediment that occurred in his case because he was not provided with access to the new (AEDPA) statute of limitations. He relied on inadequate library cases such as *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000), and *Lewis v. Casey*, 518 U.S. 343 (1996), and submitted a statement from a librarian at the Arizona State Prison Complex-Florence/East Unit, in support. The court held that Woodburn was not in fact denied access to the full text of § 2244, and there was no impediment to timely filing.¹ That should be the end of it.

¹ The district court denied a certificate of appealability – correctly, because its ruling is not arguable. This court's *sua sponte* granting of a COA was improvident, as Woodburn's competency was nowhere mentioned or evident in connection with the statute of limitations issue. Indeed, his response was clearly

and cogently based on other grounds. Woodburn obviously knows that competency can matter, because his habeas petition alleges ineffective assistance of trial counsel as a result of his failure to request a competency hearing. There is, however, no hint of any sort in Woodburn's response that his failure to file his petition within the one-year time frame had anything to do with his mental condition.